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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JENNIFER LYNN HENDERSON, Defendant and Appellant.	G039432 (Super. Ct. No. 05HF0372) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frank F. Fasel, Judge. Affirmed as modified.

Mark L. Christiansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

Jennifer Henderson appeals from a judgment after a jury convicted her of two counts of first degree murder for financial gain for her involvement in the horrific murders of Thomas and Jackie Hawks[1] in November 2004 by Skylar Deleon and his two confederates.[2] She raises the following issues: (1) the trial court erred in admitting other acts evidence pursuant to Evidence Code section 1101, and as a result, the prosecutor committed misconduct, the court erred in denying mistrial motions and she was denied the right to be present at the hearings on those motions, the court erred in instructing the jury concerning the other acts evidence, and there was cumulative error; (2) the court erred in instructing the jury with CALCRIM No. 376, "Possession of Recently Stolen Property as Evidence of Crime"[3]; (3) the court erred in instructing the jury on the financial gain and multiple murder special circumstances, and there was insufficient evidence supporting the former; and (4) the court's restitution fine was excessive. Although we conclude there were instructional errors, Henderson was not prejudiced. We also conclude the restitution fine must be reduced. None of her other contentions have merit, and we affirm the judgment as modified.

FACTS

Introduction

The evidence at trial established Deleon, Alonso Machain, and John Kennedy ruthlessly murdered the Hawks on their yacht, the "Well Deserved," by tying them to an anchor and throwing the anchor over the side. Deleon posed as a buyer of the

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[1] We refer to them collectively as the Hawks and singularly by their first names for the sake of clarity and mean no disrespect.

[2] Henderson was formerly Jennifer Lynn Henderson-DeLeon, but during her trial, she divorced Skylar Deleon and now goes by her maiden name of Henderson. Additionally, there was testimony Deleon changed his name from John Jacobson, Jr. We will refer to her as Henderson and her ex-husband as Deleon.

[3] Judicial Council of California Criminal Jury Instructions (2008).

yacht, Machain as his friend, and Kennedy as his accountant. At the time, Deleon and Henderson were married. After Henderson rejected the prosecutor's two offers of complete immunity in exchange for her testimony against Deleon, the People prosecuted Henderson for two counts of first degree murder based on the theory she used her child to persuade the Hawks that Deleon was a legitimate buyer, knowing he was going to murder them.

At trial, the court admitted evidence Henderson assisted Deleon in escaping liability for the murder of Jon Jarvi months before the offenses here. With respect to the Hawks, the evidence established that on the day before their final voyage, Deleon sensed the Hawks doubted he was a legitimate buyer, and Henderson complied with his instructions to bring their infant child to the yacht to convince the Hawks otherwise. The evidence at trial also established that on the day he murdered the Hawks, Deleon called Henderson 15 times, from the time he was in Long Beach at 7:33 a.m., to early the next morning at 1:32 a.m., when he returned to Long Beach.

Background

Henderson met Deleon on the Internet. Henderson's family and friends described her as kind, loving, loyal, naïve, religious, trusting, and hard working. They described Deleon as immature, irresponsible, and manipulative, and one who liked to tell far-fetched stories. They explained Deleon told them stories about not having a family and either being adopted or being in the foster system, and being raised in Mexico by his father's friend, "Yo Yo," a wealthy land owner. One friend and neighbor stated Deleon told her stories about him being in the military and killing people. He also told her that he was a hermaphrodite who needed to have a sex change operation because his uterus was growing and becoming cancerous.[4]

[4] There was testimony Deleon had a sex change operation scheduled for November 30, 2004.

Henderson's friends stated her relationship with Deleon proceeded quickly, but Henderson began to think Deleon was not the right person for her and the relationship cooled. But after Deleon told one of Henderson's friends he was recovering from severe injuries sustained in a near fatal motorcycle accident, Henderson returned to care for him, and they resumed their relationship. Henderson's friends stated she trusted and supported Deleon, despite learning he had a family and that he was arrested for "armed burglary."

Henderson and Deleon married on September 22, 2001, and shortly thereafter, moved into her parents' duplex. In July 2002, Deleon bought Henderson an approximately $10,000 engagement ring. Henderson, a hairstylist, and Deleon, without a stable job, were in severe debt, a fact Henderson shared with family and friends. Soon thereafter, Henderson's parents paid the couple's massive $17,000 credit card bill. And after Deleon pleaded guilty to a December 2002 burglary, her parents paid the monthly $2,100 for Deleon to attend a Seal Beach work furlough jail facility. This is where Deleon met Machain, a jail employee, and Jon Jarvi, an inmate, who Jarvi's mother described as a counterfeiter with a drug problem.

In spring/summer 2003, Henderson became pregnant with the couple's first child.[5] In late summer 2003, Deleon began serving his sentence at the work furlough jail facility. The facility required nonviolent offenders to spend the night at the facility Monday through Saturday, and work during the day.

Jon Jarvi

Sometime in December 2003, Jarvi obtained a $2,600 loan on his van and the loan company installed a tracking device on the van in case he defaulted. On December 26, 2003, Jarvi and his mother, Betty Jarvi, signed a note and deed of trust on

[5] In January 2004, the couple's first child, H.D., was born, and their second child, K.D., was born in February 2005. At trial, there was testimony Henderson's parents were raising the children.

a jointly owned condominium they had sold and that was in escrow. Jarvi obtained a $50,000 cashier's check, and by 11:32 a.m., he had $50,000 in cash.

That same day, Deleon paid approximately $17,000 in cash to have his boat repaired. He also bought Henderson a matching wedding band for about $2,100 in cash. Finally, he deposited approximately $20,000 in cash into his bank account.

The next day, Jarvi went to his mother's house, she gave him $500 for his birthday, and he told her that he was going to Mexico. That same day, Deleon called his cousin, Michael Lewis, Jr., and invited him to go surfing in Mexico, and Lewis met him at his house. Deleon told Lewis to drive Deleon's truck and gave him the keys; Deleon also gave him a cellular telephone to use. Deleon drove a sports utility vehicle. After they stopped for breakfast, they drove to a storage yard where they met Jarvi, and Deleon introduced the two men. Jarvi got into the vehicle with Deleon, and Lewis drove the truck—they drove to Mexico. Once over the border, Deleon called Lewis on the cell phone. During the first call, Deleon told Lewis that he was going to drop off Jarvi in Mexico. Ten minutes later, Deleon called and said Jarvi had friends that were going to pick him up in Mexico. Lewis thought the calls were strange.

They arrived at the surf spot in Mexico, and Deleon said he needed to go to the bank. They drove to Ensenada where Deleon went into the bank, and Lewis and Jarvi waited outside. When Deleon returned, he told Lewis to follow them. Deleon led Lewis on a "back road out of Ensenada" and at some point turned around. Deleon again called Lewis and talked about the house where he would drop off Jarvi. Deleon lost Lewis, and when Lewis caught up with Deleon in a desolate area, Deleon was escorting Jarvi out of the vehicle. Jarvi had something wrapped around his face and appeared to be at ease. Lewis suspected trouble and decided to drive back to the surf spot. As he was leaving, he saw a white car that appeared to be stopping. Later, Deleon, wearing a different shirt and by himself, appeared at the surf spot, and suggested they get something to eat. Unsuccessful in finding a meal in Puerto Nuevo and Carlsbad, they drove to Long Beach

and ate. While eating, Deleon said Lewis was "part of the dark side[,] [t]he devil side." After they ate, Deleon checked himself back into the work furlough jail facility, and Lewis drove the truck to Deleon's home and gave the keys to Henderson.

A week or two later, Deleon told Lewis that Jarvi had his throat slit and the police had questioned him. Sometime later, Deleon called Lewis and told him that Henderson would be calling him and telling him what to say if police questioned him. Henderson called and left a voice mail explaining police were investigating Deleon for Jarvi's murder and to call her back. When he called her back, Henderson told him to tell police the two of them, Henderson and Lewis, went to Mexico to buy Henderson's favorite ice cream. They were both concerned about the police learning Deleon left the country because it would violate his work furlough conditions.[6] The tracking device on Jarvi's van placed it near Deleon and Henderson's residence on two different days in early January 2004. In April 2004, Deleon completed his term at the work furlough jail facility.

The Couple's Debt

The couple's 2003 tax records showed Henderson had a gross income of $21,000 and Deleon $11,000. In October 2004, they bought a Toyota Highlander for approximately $36,000; their monthly payments were $687. The following week, they borrowed $3,000 from Deleon's grandparents. Henderson told Deleon's grandmother they would be receiving a large sum of money and they would repay the loan. By November 2004, Deleon and Henderson owed her parents approximately $30,000. They also had credit card debt totaling approximately $25,000. On November 13, their joint checking account was overdrawn $52.

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[6] On cross-examination, Lewis stated the alibi concerned his work furlough conditions, but on redirect examination, after having his memory refreshed with a police report, he admitted Henderson told him police were investigating Deleon for Jarvi's murder.

The Hawks and the Well Deserved

In October 2004, Thomas and Jackie Hawks owned a 55-foot yacht called the Well Deserved. They lived on the yacht for approximately two years, but when Thomas's son announced his wife was pregnant, the Hawks decided to sell the vessel and return to Arizona to spend more time with their grandchild. The Hawks advertised their vessel for sale in a boating magazine for the price of $465,000.

Preparation

In October 2004, Deleon called Lewis and asked him to go scuba diving. Deleon told him "somebody" was not going to return from the scuba diving trip.

That same month, Deleon asked Adam Rohrig, his scuba instructor, if he would drive a boat while Deleon made two people disappear. He also asked Rohrig how to make a body sink. When Rohrig asked Deleon how he would get away with doing that, Deleon replied, "'no body, no crime.'"

Also the same month, Deleon asked Machain if he wanted "'to make a few million dollars.'" Deleon and Machain had become friends at the work furlough jail facility, and Deleon had secured a new job for Machain.[7] Machain asked him how that was possible without doing something illegal, and Deleon replied, "'[It] isn't illegal unless you get caught.'" Deleon explained he killed "bad" people and kept their money. He told Machain there was a couple who were selling a yacht and he was going to act as a buyer, kill them, and keep the vessel. Deleon showed him pictures of the Well Deserved and began to plan the crime.

On November 1, 2004, in the afternoon, there was an eight-minute telephone call from Deleon's cell phone to Thomas's cell phone. The next day, Deleon and Henderson met Teresa Rogers, a real estate agent, and Henderson's client. They told Rogers that they were interested in seeing properties in the $2 million range with a

[7] Machain testified under a grant of use immunity.

55-foot boat slip. When Rogers asked how they were going to pay for the home, Henderson said the sale of two boats. She explained they would be receiving money and a $400,000 yacht in Newport Beach from Deleon's family in Mexico who owed him. Rogers advised them to speak with their accountant. That evening, there was an 11-minute telephone call from Henderson's cell phone to Thomas's cell phone.

Deleon and Henderson met with their accountants, David and Jo Ann Zahn. The couple said they would be receiving a large sum of money and a yacht. When asked where the money was coming from, Deleon explained he had gone to jail for possessing drugs as a favor for someone and he was being paid back. Henderson appeared to want the financial matter done legally.

On November 3, 2004, Deleon and Machain bought two stun guns. Two days later, Machain bought two pairs of handcuffs.

Execution

On the morning of November 6, 2004, Deleon called Machain twice. After the calls, and multiple calls to his father, John Jacobson, Sr., Deleon called Henderson. Deleon and Machain drove to Newport Beach to meet the Hawks. Deleon called Henderson again. They parked away from the dock and surveyed the area before calling Thomas. After speaking with his father, Deleon called Henderson twice. Thomas picked them up in a dinghy and took them to the yacht where they met Jackie and discussed the purchase. During the conversation, Machain noticed Deleon's demeanor change, and Machain knew it was not the day to carry out the plan—the plan was for Machain to subdue Jackie and for Deleon to subdue Thomas.[8] As Thomas escorted Deleon and Machain back to the dock in the dinghy, they discussed banks and Deleon mentioned he was married and had a new baby. Once alone, Deleon told Machain the Hawks had

[8] At trial, Machain described Thomas, an ex-firefighter and retired probation officer, as "very physically fit for his age." When the prosecutor asked Machain whether Thomas was bigger than Deleon, he responded, "Oh, yes[.]"

contradictory stories for why they were selling the yacht and Thomas, a retired probation officer, probably "'screwed'" someone. As they drove back to Long Beach, Deleon told Machain he wanted to call Henderson and tell her to meet the Hawks and "make it look like . . . he is really interested in buying the boat." Deleon called Henderson and told her to meet the Hawks and "make [them] feel more at ease." For the remainder of the day, there were numerous calls between Deleon and Henderson, Deleon and his father, and Deleon and Thomas.

At some point, Deleon, Henderson, who was pregnant, and their daughter visited the Hawks on the Well Deserved. On November 9, 2004, Deleon and Machain returned to the yacht. The Hawks, who were talkative and appeared more comfortable, took them on a tour of the harbor.

On November 14, 2004, Deleon called Machain three times around dinner time. Immediately after the last call to Machain, Deleon called Orlando Clement, and Myron Gardner, Sr., called Deleon. Deleon called Machain again. Approximately one hour later, Deleon called Henderson. About 30 minutes later, a durable power of attorney was created on Deleon and Henderson's home computer. In the durable power of attorney, Thomas granted a general power of attorney to Deleon. Deleon called Henderson 20 minutes later, and 20 minutes after that, Henderson called Deleon and the power of attorney on the computer was modified. Deleon called Henderson three times over the course of the following 30 minutes. Twenty minutes after his last telephone call with Henderson, Deleon called Thomas.

On the morning of November 15, 2004, Deleon called Machain and Henderson. After Machain returned his telephone call, Deleon picked him up and they drove to Los Angeles to pick up a third person who Deleon had arranged to help because Deleon realized he was no match for Thomas. Deleon had told the third man the same story he told Machain and offered him the same reward, but the man did not arrive at the predetermined meeting area. After a series of telephone calls between Deleon, Clement,

and Gardner, John Fitzgerald Kennedy arrived at the predetermined meeting spot. Deleon explained the plan, Kennedy agreed, they picked up clothes, and they drove to Newport Beach. Deleon called Thomas when they arrived at the dock, and later, he called Henderson. Thomas picked them up in a dinghy, and Deleon introduced Kennedy to Thomas as his accountant.

As the Well Deserved traveled out to sea, Deleon asked to borrow a wetsuit so he could inspect the yacht's hull. Once the yacht stopped, Deleon inspected the hull, got out of the water, and changed back into his clothes. Machain was in the galley with Jackie, and Deleon and Kennedy were below, in the bedroom, with Thomas. Jackie suddenly exclaimed, "'what is going on?'" and Machain looked to see Kennedy with his arm around Thomas's neck and Deleon standing next to him. Machain's efforts to stun Jackie were unsuccessful because she fought him off, but he eventually managed to handcuff her. The men put the Hawks, both handcuffed, on the bed. Jackie stated, "'Skylar, why are you doing this? We trusted you. You brought your wife and your kids [*sic*]. You had them here. How can you do this? We trusted you.'" Jackie cried and said she did not want to die. The men put duct tape over the Hawks's eyes and mouths.

After the men restrained the Hawks, Deleon went upstairs, and the yacht resumed traveling out to sea. The vessel's global positioning system showed someone entered two waypoints, or specific locations, at 4:21 p.m. The first waypoint, 33, was one and one-quarter mile outside Newport Harbor, and the second waypoint, 34, was 55 miles off the coast. Six minutes later, Deleon called Henderson.

The men brought Jackie and Thomas upstairs, individually, unhandcuffed them, and told them to sign and place their thumbprint on the durable power of attorney form. Deleon told the Hawks that if they complied, he would let them go. The Hawks did as instructed, and provided their names, birthdates, social security numbers, and address as Deleon typed the information into his laptop computer; this was about

4:51 p.m. The men took the Hawks downstairs while they continued their trip out to sea. Machain was charged with watching the Hawks—Thomas reached for his wife's hand to comfort her as she cried and said she wanted to see her grandchild. Meanwhile, Deleon and Kennedy retrieved an anchor and rope and took both to the back of vessel.

Near waypoint 33, there was a cell phone call between Deleon and Henderson at 6:25 p.m. Over the course of the next following 22 minutes, there were four additional calls between the two.

At some point, Deleon and Kennedy duct taped the Hawks's eyes and mouths again, and the men led the Hawks, who had their hands handcuffed behind their backs, to the back of their yacht. Deleon and Kennedy tied the Hawks together with the rope; the Hawks were tied so Jackie's back rested against Thomas's chest. Deleon was standing behind Thomas, and Thomas, realizing his fate, lifted his right leg and kicked Deleon sending him flying and crashing onto a deck chair. Kennedy punched Thomas on his right temple, which left him staggering. Jackie used all her strength to keep her husband standing. Deleon tied the Hawks to the anchor.

Deleon lifted the anchor and threw it overboard, and Kennedy pushed the Hawks off their yacht. Jackie hit the yacht wall, and the anchor ripped them into the ocean.

Deleon turned the vessel around, and the men started searching for valuables. Machain found an envelope with cash, which they divided three ways. As they headed towards shore, Kennedy drank a beer while he fished off the back of the vessel. Machain threw the stun guns in the ocean. At 8:56 p.m., Deleon called Henderson from a location where the call was transmitted through a cell tower on Santa Catalina Island. Henderson called Deleon twice minutes later. Using Machain's cell phone, Deleon called Henderson at 9:22 p.m., and the call lasted four and one-half minutes.

When they returned to the harbor, Deleon gave Machain the Hawks's cell phone and told him to drive to Tijuana and make a call. At 11:48 p.m., Deleon called Henderson from Newport Beach. Deleon and Machain returned to Long Beach, and Machain drove to San Ysidro and made the call on the Hawks's cell phone. Henderson called Deleon twice around 1:30 a.m., on November 16, 2004, when Deleon was back in Long Beach.

Aftermath

On November 17, Henderson called her father, Steven Henderson (Steven), and asked if he wanted to help clean the Well Deserved. After stopping to purchase supplies, Steven drove to the dock. Henderson seemed happy, and both she and Deleon assured him the sale was legitimate. Deleon and Henderson removed the Hawks's personal items from the bedroom, some of which they kept and some of which they donated. On another occasion, Deleon, Henderson, their child, and Henderson's parents were at the dock when Deleon pointed out the Hawks's car. Steven asked what prevented them from taking the car if the Hawks left it, and he drove it home.

On November 19, Henderson deposited $1,538 into their joint checking account. A portion of that was cash.

Around the same time, Deleon told Rohrig that he needed something notarized and Rohrig arranged for his friend Kathleen Harris[9] to provide notary services. On November 22, 2004, Henderson called Harris and asked her to meet her and Deleon at their hotel in Long Beach.[10] When she arrived, Deleon asked Harris to notarize the durable power of attorney forms the Hawks had signed. When Deleon asked Harris to

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[9] Harris testified pursuant to a grant of transactional immunity.

[10] They were staying at a hotel because there was a fire at Henderson's parents' residence.

backdate the notary, Henderson stated, "November 15." Deleon gave Harris $2,000 and Henderson said they would give her more money when everything was finalized.

On November 23, Deleon, Henderson, their child, and Steven drove to Arizona to finalize the yacht sale. The next day, after they had the power of attorney forms recorded, they went to a bank in Kingman. Deleon and Henderson used the power of attorney forms to access the Hawks's bank account, but the manager explained she would have to verify the Hawks's signatures on the forms through their home branch in Prescott. When Henderson asked how to sign as a power of attorney on a check, the manager explained, but Henderson indicated she did not feel comfortable signing Thomas's and Jackie's names, only printing them.

Meanwhile, the Hawks's family was beginning to worry because no one had heard from them. On November 22 or 23, 2004, Thomas's brother, James Hawks (James), went to the yacht and left his business card. On November 24, 2004, Henderson called James and nervously told him that she and her husband had purchased the Well Deserved and the Hawks told them to take their time in removing their personal items from the vessel. James told her that if she heard from the Hawks, to please have them call him.

On November 26, 2004, Deleon drove the Hawks's car to Ensenada, Mexico to meet his friend, Jose Medrano.[11] Henderson followed in their car. When they arrived, Deleon gave the Hawks's car to Medrano. Medrano, who was not standing near them, saw Deleon and Henderson talking for a lengthy amount of time and they both seemed worried and nervous. After Deleon and Henderson were unsuccessful in opening a bank account in Mexico, they left.

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[11] His father is Yo Yo.

Later that day, Deleon called the Hawks's bank in Prescott to determine whether the bank had received the wired funds and the power of attorney. The bank manager, who had learned the Hawks had disappeared, began to question Deleon about their whereabouts. Deleon was evasive and said he would call back, but he never did.

Also that day, Henderson called James and apologized for her demeanor during their previous call. She explained Deleon was searching for the Hawks and wanted to know whether he had heard from them. When James asked her how they paid for the yacht, Henderson hesitated and replied, "'They had payment in hand when we left them'" at the dock. James heard a voice in the background. James indicated the Hawks's family was very worried and they were going to file a missing persons report. Henderson asked him to have the Hawks call her or Deleon if he heard from them, and they would do the same.

A few days later, Deleon and Henderson spoke with Kathi Krencik, who handled yacht escrows, about transferring ownership of the Well Deserved. Krencik received, via fax, the bill of sale, but it was not properly notarized because of the Hawks's all purpose power of attorney. Krencik informed Deleon of the error. When Deleon faxed a new bill of sale, Krencik became suspicious and called the police because of the unusual nature of the power of attorney.

Based on the missing persons report and other information discovered during the preliminary investigation, Detectives David Byington and Detective Evan Sailor learned Deleon and Henderson were the last people to see the Hawks. On November 29, 2004, Byington and Sailor found them cleaning a church in Long Beach, and both agreed to be interviewed. Byington interviewed Henderson while Sailor interviewed Deleon. Henderson said she and Deleon purchased a large vessel and the mooring from the Hawks and they had the sale documents.[12] Henderson admitted she

[12] A portion of Byington's interview with Henderson was recorded, and the compact disk was played for the jury.

had been on the yacht with her daughter and Deleon, explained Deleon negotiated a purchase price of $265,000, and claimed they paid cash for the yacht from Deleon's acting royalties and real estate investments.[13] After Byington and Sailor compared their stories, Byington told Henderson that Deleon stated they paid $465,000 for the vessel. Henderson apologized for lying, claimed she was scared because of tax consequences, and admitted they paid $465,000. After Byington spoke with Deleon and Sailor with Henderson, Byington confronted Henderson with Deleon's admission the money came from a narcotics transaction. Henderson acknowledged the same. The detectives followed Henderson and Deleon to the hotel to obtain copies of the sale documents, but they could not produce a bill of sale; Henderson said she could.

The next day, Deleon, Henderson, and their child went to the Newport Beach Police Station, where Henderson produced an unsigned bill of sale. At some point, officers learned the Hawks's car had been found in Mexico. On December 16, 2004, Henderson called Byington and told him Deleon obtained the money for buying the yacht by committing a burglary.[14] Soon afterwards, officers learned Deleon had submitted a request to his probation officer to leave the country. While Byington went to Mexico to recover the car, Sailor executed a search warrant at Deleon and Henderson's residence and arrested Deleon. Officers recovered Jackie's laptop computer, the Hawks's personal documents, videotapes of the Hawks's vacation and holiday, and bags from the Well Deserved.

On February 22, 2005, Detective Keith Krallman interviewed Henderson on the telephone.[15] When Krallman asked her whether Deleon ever drove a van, she said

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[13] There was testimony Deleon had small parts in the Power Rangers television show.

[14] A portion of Byington's telephone conversation with Henderson was recorded, and the audiotape was played for the jury.

[15] The interview was recorded, and the compact disk was played for the jury.

detectives questioned them concerning a guy with a van. She explained a guy who Deleon met in jail tried to give them a van because he was going out of town, but they did not want it, and after he left the van at their house, they dropped the van off at a business in Long Beach. Krallman implored her to tell the truth, but Henderson explained she lived with her children and parents and she was afraid of Deleon's father. After he asked her what she thought happened to the Hawks, Henderson said she did not "know what happened to them[,]" had nothing to do with their disappearance, and had not been in their car. She eventually acknowledged Deleon drove the Hawks's car to Mexico. Henderson admitted she handled the family's financial affairs. Near the end of the interview, Henderson remembered the man who gave them the van was found in Mexico with his throat slit. Henderson stated neither she nor Deleon killed the Hawks.

Officers arrested Henderson in April 2005. While they were in jail, Henderson wrote Deleon a plethora of letters where she expressed her love for him. She was upset because her parents refused to take her children to visit Deleon in jail. During a taped jail conversation between Henderson and her friend, Henderson was expressing her frustration with her father when she stated, "And it makes you wonder why I, you know, married somebody [who] doesn't make any decisions."

The Trial

An amended information charged Henderson with the murder of Thomas (Pen. Code, § 187, subd. (a))[16] (count 1), and the murder of Jackie (§ 187, subd. (a)) (count 2). The information alleged as special circumstances Henderson committed multiple murders (§ 190.2, subd. (a)(3)), and committed both murders for financial gain (§ 190.2, subd. (a)(1)).

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[16] All further statutory references are to the Penal Code, unless otherwise indicated.

At trial, the prosecutor offered Machain's testimony, and he provided the sole evidence concerning the details of the Hawks's deaths as detailed above. On cross-examination, Machain stated Deleon told him Henderson knew what he was doing, but Machain admitted he never heard Deleon speak with Henderson about the crime, and he never spoke with Henderson about the crime. Machain stated the only time he heard Deleon speak with Henderson regarding the Hawks was when he called her and told her to bring their child to meet the Hawks to put them "'at ease[.]'" Defense counsel cross-examined Machain thoroughly about Deleon's talent for lying and his ability to manipulate people into doing what he wanted. On redirect examination, when the prosecutor asked what caused Thomas's demeanor to change between November 6, when he seemed circumspect, and November 9, when he was more relaxed, Machain replied, "I believe [Deleon] took [Henderson] to meet the Hawks[]."

The prosecutor also offered the testimony of Detective David White from Newport Beach. White explained that on the day Jarvi was murdered, Deleon and Henderson spoke on the telephone 17 times. He stated Deleon called the jewelry store, he called Henderson, and Henderson called the jewelry store all around mid-day. White stated there were no calls between the two from 12:15 p.m., the time Deleon was in San Ysidro, to 5:52 p.m., probably because Deleon did not have cell phone service in Mexico. He said the calls began again at 5:52 p.m., when Deleon was in San Ysidro, and after she spoke with Deleon, Henderson called the bank. White stated Deleon and Henderson spoke on the telephone 15 times the day of the Hawks's murders. Based on a non-exhaustive sampling of calls between Deleon and Henderson from the previous year, White opined the amount of calls on December 27 and November 15 was more than twice the average number of daily calls.

The prosecutor offered the testimony of Colleen Francisco, Lewis's mother and Deleon's aunt. Francisco testified that on December 19, 2004, Henderson told her she and Deleon were the last people to see the Hawks alive. Francisco asked her whether

Deleon killed anyone, and she was silent. Francisco asked Henderson if she killed anyone, and she was silent and "smirked." Francisco asked why, and Henderson replied, "'We needed the money[.]'" She called the police. After defense counsel refreshed her recollection with her interview transcripts, Francisco admitted she never told officers Henderson smirked or that she made the comment about needing money. On redirect examination, Francisco stated she was certain Henderson made the comment. She also explained Henderson mused about hiring an attorney and "that this was going to be bigger than [they] had expected." Finally, Francisco stated Henderson indicated she had arranged for other people to care for her children.

The prosecutor also offered Sailor's testimony. Sailor confirmed Francisco told him that Henderson made the comment about needing money and also that she knew what happened to the Hawks. On cross-examination, Sailor conceded Francisco told him that she did not know what Henderson meant by her comments.

The prosecutor also offered the testimony of Henderson's family. Steven and Lewis both testified Henderson "wore the pants in the relationship[.]" Steven also stated Henderson was responsible for the couple's finances and she consulted him for financial advice. Lewis said Deleon had to check with Henderson before doing anything, and if she did not want him to do something, he could not do it. He described Deleon as one who would formulate a plan, get people involved in the plan, and then change the plan without advising anyone of the new plan. Lewis said Deleon told him that he told Henderson everything.

Marlene Jacobson, Deleon's grandmother testified. She stated that on one occasion, she asked Henderson why she married Deleon, and Henderson indicated for money.

Harris also testified for the prosecution. Harris explained that Rohrig called and asked her to notarize a second document, an unsigned bill of sale. Despite her

serious reservations about notarizing the document, Harris complied after Rohrig told her not to "mess" with "'these people'" because she and her family would be killed.

As we explain above, Henderson's defense was that the prosecutor's case was based on circumstantial evidence and he failed to prove beyond a reasonable doubt Henderson knew that when she went to the Well Deserved with her child her role was to facilitate the Hawks's murders. Defense counsel's theory was Deleon was a compulsive liar who manipulated the innocent and naïve Henderson into participating in his plan though she did not know Deleon would kill them.

The jury convicted Henderson of two counts of first degree murder and found true the special circumstances. After denying her motion for a new trial, the trial court sentenced Henderson to two consecutive life terms without the possibility of parole. As relevant here, the court ordered her to pay a $20,000 restitution fine pursuant to section 1202.4, subdivision (b).

DISCUSSION

I. The Jarvi Murder Evidence

Henderson raises numerous issues with respect to admission of the Jarvi murder evidence. We will address each in turn.

A. Admissibility and Jury Instruction

1. Admissibility

a. Evidence Code section 1101, subdivision (b)

Henderson argues the trial court erroneously admitted evidence of the Jarvi murder because evidence she was an accessory after the fact in that case did not tend to prove she knew Deleon intended to kill the Hawks. As we explain below, we conclude the trial court properly admitted the evidence as to her intent and knowledge.

Evidence of uncharged acts is generally inadmissible to prove criminal disposition. (Evid. Code, § 1101, subd. (a); *People v. Kipp* (1998) 18 Cal.4th 349, 369.) However, Evidence Code section 1101, subdivision (b), allows the trial court to admit

"evidence that a person committed a crime . . . or other act when relevant to prove some fact (such as motive, . . . intent, . . . plan, [or] knowledge . . .) other than his or her disposition to commit such an act."

"'The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.' [Citation.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 22-23.) Other acts evidence is relevant where the other acts evidence and the charged offense are sufficiently similar. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 401-402 (*Ewoldt*).)

Here, defense counsel objected to admission of the Jarvi murder evidence. Defense counsel explained that in the Jarvi case, the evidence was being introduced to show Henderson was an accessory after the fact, whereas here, the prosecutor was proceeding on the theory she was an aider and abettor. Counsel also asserted there were no similarities between the two offenses, other than the fact both cases involved murders. After pointing out eight similarities between the two crimes, the prosecutor contended the evidence was admissible to show intent, knowledge, and common plan or scheme. Defense counsel reiterated his previous claims and addressed the alleged similarities. At the court's request, the prosecutor then repeated in detail, the similarities between the two incidents. Defense counsel disputed the similarities, and the extent of Henderson's involvement. Counsel also claimed Evidence Code section 352 required exclusion of the evidence. Finally, the prosecutor indicated Henderson knew Deleon was a suspect in the Jarvi murder no later than January 28, 2004.

The trial court stated: "Well, I don't know. The only similarity the court sees, based upon the offers of proof and argument by counsel, are the charges. [Section] 187 special circumstance against [Henderson] in the Hawks murders, and [section] 32 . . . that was [section] 995 last Friday by the court, and subject matter of this [Evidence Code section] 1101[, subdivision] (b)[,] motion. [¶] But, I don't think [Evidence Code

section] 1101[, subdivision] (b)[,] and *Ewoldt* preclude[] conduct evidence that is similar. I do see a lot of similarities, especially as relates to the Hawks case, conduct of a conspiratorial nature after the homicide. It would appear to the court, based upon the offer of proof, that the conspiracy is continuing. If there wasn't any evidence by the prosecution regarding allegedly [Henderson's] involvement before the homicide, it would be another [section] 32 . . . . That is, I am referring to her conduct after the homicide in the Hawks case. [¶] Basically, it is cover-up, clean-up, financial gain. And I think the court does see the intent argument by the prosecution with respect to attempting to introduce the Jarvi motive murder to show she knew what her husband was up to, and what she evidently was up to also if you believe the prosecution's version of this. [¶] And that shows intent, at least as the court sees it. As relates to the Hawks murder [*sic*]. And, also shows that there was some financial gain to be had in both matters. So it is irrelevant -- relevant to that and it is relevant to intent to gain financially as alleged pursuant to the special circumstances. [¶] The court has done a[n] [Evidence Code section] 352 weighing process with respect to these facts. It is prejudicial, but it is way far outweighed, it appears to this court, by its probative value for the reasons the court just indicated. So the objection is overruled."

After both sides rested, defense counsel moved to strike all the Jarvi murder evidence and requested the trial court instruct the jury not to consider the evidence. Defense counsel argued there was insufficient evidence establishing Henderson knew Deleon murdered or was involved in murdering Jarvi and her telephone call to Lewis concerning going to Mexico for ice cream was because Deleon's work furlough conditions forbade him from leaving the country and not because she knew he was involved in murdering Jarvi. Counsel again argued this evidence was more prejudicial than probative. The prosecutor noted Lewis testified Henderson told him Deleon was being investigated for a murder in Mexico and the story about buying ice cream in Mexico "was to cover for him, for his potential probation." Defense counsel repeated the

two incidents were not sufficiently similar and the evidence was not compelling on the issues of what Henderson knew and when she knew it.

The court stated: "One thing I need to comment -- we did this on a[n] [Evidence Code section] 402 basis; that is, some of the facts that may give rise to [section] 32, speaking generally, could be -- could be defined as aiding and abetting after a homicide within the meaning of a conspiracy or uncharged conspiracy. [¶] In other words, if the conspiracy continues to get money or possession of some objects which was the motive of the homicide, then it would appear to the court, legally speaking, that the -- that a conspiracy charged or uncharged continues until the objective has been completed. [¶] So if that's the hypothetical, any acts by an aider and abettor after the homicide would coincide with any [section] 32 . . . type of facts. If you understand what I meant by that. That's just a general observation. [¶] Separate and apart from that, the court has spent several minutes listening to both counsel argue and argue facts and interpretation. I think that's exactly what it is. It is a question of fact. [¶] There is nothing that changes the court's mind with respect to the admissibility of the [Evidence Code section] 1101[, subdivision] (b)[,] evidence, and the court finds that it is relevant as relates to any interpretation of common scheme or plan, intent or knowledge. It is a question of fact. It is obviously a jury decision. It is more probative than prejudicial. [¶] The court intends to instruct on conspiracy theory or uncharged conspiracy theory as relates to the burden of proof. The jury is going to listen. I am assuming, counsel will argue that issue like they have argued it in shortened form here today. [¶] It is a jury call as to whether or not the Jarvi murder indicates she had knowledge or was involved in a common plan or scheme, and had intent to aid and abet the Hawkses' murders. [¶] So, with that in mind, the motion to strike is denied." Over defense counsel's objection, the trial court instructed the jury with CALCRIM No. 375, "Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc."

The trial court admitted evidence of the Jarvi murder to demonstrate the following: (1) Henderson had a plan or scheme to commit the offenses alleged in this case; (2) Henderson had a motive to commit the offenses alleged in this case; (3) Henderson acted with the intent to commit murder for financial gain in this case; and (4) Henderson knew Deleon intended to commit murder when she allegedly acted in this case.

Preliminarily, we recite the evidence tending to show the extent of Henderson's involvement in the Jarvi murder. At the outset, we note Henderson was pregnant, and the couple was in severe debt and lived with her parents. With respect to the Jarvi murder, there was no evidence Henderson was in any way involved in planning Jarvi's murder or carrying it out. The only evidence linking Henderson to the Jarvi murder was the 17 telephone calls between Henderson and Deleon the day Jarvi was murdered. Specifically, after Deleon and Lewis left Mexico, Deleon and Henderson spoke on the telephone four times, and after their last call, Henderson called the couple's bank. The remainder of the evidence linking her to the crime was her conduct after the murder.

Although Henderson disputes the reason she called Lewis and asked him to tell police they went to Mexico to buy ice cream, Lewis testified Henderson told him the police were investigating Deleon for Jarvi's murder in Mexico and they were concerned about the police learning Deleon left the country because it would violate his work furlough conditions. Based on this evidence, it was certainly reasonable to conclude Henderson intended to fabricate an alibi for Deleon to show he could not have killed Jarvi because he was not in Mexico and he did not violate his work furlough conditions. And, Henderson admitted to Krallman she helped Deleon dispose of Jarvi's van. Finally, there was evidence that when law enforcement officers interviewed Henderson about Jarvi's murder, she was not entirely forthcoming. This evidence tended to show that with

respect to the Jarvi murder, Henderson was an accessory after the fact. We now address whether the trial court properly admitted the evidence.

i. Common plan or scheme

"[E]vidence of a defendant's uncharged misconduct is relevant where the uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan. [¶] In determining whether evidence of uncharged misconduct is relevant to demonstrate a common design or plan, it is useful to distinguish the nature and degree of similarity (between uncharged misconduct and the charged offense) required in order to establish a common design or plan, from the degree of similarity necessary to prove intent or identity. [¶] . . . [¶] A greater degree of similarity is required in order to prove the existence of a common design or plan. As noted above, in establishing a common design or plan, evidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' [Citation.] '[T]he difference between requiring similarity, for acts negativing innocent intent, and requiring common features indicating common design, for acts showing design, is a difference of degree rather than of kind; for to be similar involves having common features, and to have common features is merely to have a high degree of similarity.' [Citations.] [¶] To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. For example, . . . evidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts. Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the

inference that the defendant employed that plan in committing the charged offense. [Citation.]" (*Ewoldt, supra,* 7 Cal.4th at pp. 401-403, fns. omitted.)

Here, evidence of Henderson's conduct *after* the Jarvi murder does not demonstrate circumstantially she aided and abetted the Hawks's murders pursuant to a common plan or scheme. Contrary to the Attorney General's contentions, there was no evidence Henderson was involved in a common plan or scheme to murder Jarvi. Evidence she assisted Deleon evade criminal liability for Jarvi's murder does not provide circumstantial evidence she participated in a common plan or scheme to murder the Hawks. At best, it demonstrates Henderson actively assisted Deleon after the murder had occurred. However, being an accessory after the fact is not similar to being a murderer. The principal purpose of other offenses evidence to prove a common plan or scheme "is to *identify the defendant* as the perpetrator of the crime charged." (1 Witkin, Cal. Evidence (4d ed. 2000) Circumstantial Evidence, § 92, p. 434.) Henderson's intent was at issue at trial. The Jarvi murder evidence was not relevant to identify Henderson as the perpetrator of the Hawks's murders based on a common plan or scheme to kill the Hawks.

ii. Motive

"Generally, evidence of a defendant's poverty or indebtedness is inadmissible to establish a motive to commit robbery or theft, 'because reliance on poverty alone as evidence of motive is deemed unfair to the defendant, and the probative value of such evidence is considered outweighed by the risk of prejudice.' [Citation.] Evidence that a defendant committed other crimes may be admitted when relevant to establish a motive for the commission of the charged offense . . . [citations], but only if the offenses share common features [citation]." (*People v. McDermott* (2002) 28 Cal.4th 946, 999.)

At the time of the Jarvi murder and the Hawks's murders, Henderson was pregnant, and the couple was in severe debt and lived with her parents. But again evidence Henderson assisted Deleon in escaping criminal liability for the Jarvi murder does not tend to prove she had a motive to aid and abet the commission of the Hawks's murders. The offenses are too dissimilar to conclude Henderson's conduct in assisting Deleon escape liability for the Jarvi murder tended to prove she aided and abetted Deleon in carrying out the Hawks's murders. The Jarvi murder evidence was not relevant on the issue of Henderson's motive to kill the Hawks.

iii. Intent and knowledge

"The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent [and knowledge]. [Citation.] '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act. . . .' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*Ewoldt, supra,* 7 Cal.4th at p. 402.)

Remembering the least degree of similarity is required between the uncharged offense and the charged offenses to prove intent and knowledge, evidence Henderson assisted Deleon in avoiding liability for the Jarvi murder tended to prove she knew Deleon planned to kill the Hawks for financial gain and she intended to aid and abet him in the commission of that crime. The evidence demonstrated that on the day of the Jarvi murder, Deleon called Henderson four times after he returned to the United States, and Henderson then called the couple's bank where Deleon had deposited over $20,000 earlier that day. A few weeks later, Henderson knew law enforcement considered Deleon a suspect in the Jarvi murder. She called Lewis and told him that

Deleon was a suspect in that crime. Regardless of the purpose, Henderson asked Lewis to tell law enforcement she and Lewis, and not Deleon, were in Mexico. She also helped Deleon dispose of Jarvi's van. Henderson's conduct in assisting Deleon escape liability for the Jarvi murder was circumstantial evidence she knew Deleon was capable of committing murder for financial gain and coupled with her conduct of taking her daughter to meet the Hawks to put them "at ease," the jury could reasonably infer she intended to aid and abet Deleon in murdering the Hawks for financial gain.

b. Evidence Code section 352

Although other acts evidence might be relevant to prove a material fact other than a defendant's criminal disposition, this evidence is subject to exclusion pursuant to Evidence Code section 352. (*Ewoldt, supra,* 7 Cal.4th at p. 404.) Evidence Code section 352 authorizes the trial court to "exclude evidence if its probative value is substantially outweighed by the probability" its admission will create a substantial danger of undue prejudice. For purposes of Evidence Code section 352, "prejudice" means "'evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. [Citation.]'" (*People v. Heard* (2003) 31 Cal.4th 946, 976.) We review a trial court's ruling under Evidence Code section 352 for an abuse of discretion. (*People v. Valdez* (2004) 32 Cal.4th 73, 108.)

Henderson complains that evidence of the Jarvi murder should have been excluded pursuant to Evidence Code section 352 because it was inflammatory, confusing, cumulative, and time consuming. We disagree.

First, Henderson contends the evidence was inflammatory because the jury heard evidence of Jarvi's gruesome death and saw a picture of him with his throat slit, and the jury would punish her because she escaped punishment in that case, and her actions allowed Deleon to kill again. Evidence Jarvi had his throat slit was certainly no more inflammatory than the details of the Hawks's chilling deaths. We need not recount

the details again, but one can hardly think of a more disturbing image than an anchor being thrown overboard slamming Jackie into the yacht wall before pulling the couple to the bottom of the Pacific Ocean to their deaths. It is unlikely the jury disbelieved the evidence of the charged offenses but convicted her based on the strength of the evidence of the uncharged offenses. (*Ewoldt, supra*, 7 Cal.4th at p. 405.)

Second, she asserts the Jarvi murder evidence was cumulative. Throughout the trial, Henderson contested her knowledge of Deleon's involvement in the Hawks murders. Until intent and knowledge are adequately established, evidence relevant to those issues is not cumulative. (*Ewoldt, supra*, 7 Cal.4th at pp. 405-406.) To the extent that evidence could be construed differently, that was for the jury to decide. (See *People v. Kraft* (2000) 23 Cal.4th 978, 1061-1062 [task of determining similarity jury issue].)

Third, Henderson contends the Jarvi murder evidence consumed an undue amount of time. Not so. "Conceivably a case could arise in which the time consumed trying the uncharged offenses so dwarfed the trial on the current charge as to unfairly prejudice the defendant . . . we cannot say spending less than a third of the total trial time on these issues was prejudicial as a matter of law." (*People v. Frazier* (2001) 89 Cal.App.4th 30, 42 [uncharged offense evidence that comprised 27 percent of the total trial transcript did not consume an unreasonable amount of time].) Of the prosecutor's witnesses, only 10 of the 34 witnesses, or 30 percent, concerned the Jarvi murder. And of the approximately 900 pages of testimony, about 130 pages, or 15 percent, concerned the Jarvi murder. We cannot conclude the Jarvi murder evidence consumed an undue amount of time.

Finally, she grouses the Jarvi murder evidence was confusing because there was testimony concerning telephone calls in both cases and there was evidence concerning her conduct after the crimes on both cases. We fail to see how the jury could confuse the evidence as the incidents were approximately one year apart and involved a murder in Mexico and murders off the coast of Newport Beach involving a yacht. And,

we disagree the jury was confused because it had to apply a preponderance of the evidence standard to the uncharged offenses evidence and a beyond a reasonable doubt standard to the charged offenses. We presume jurors are intelligent people "'"capable of understanding [the] instructions and applying them to the facts of the case."' [Citations.]" (*People v. Carey* (2007) 41 Cal.4th 109, 130.) Therefore, we conclude the trial court properly admitted the Jarvi murder evidence to prove Henderson's intent and knowledge and her federal due process rights were not implicated.

2. CALCRIM No. 375

Henderson claims CALCRIM No. 375 usurps the jury's function in evaluating the Jarvi murder evidence, the trial court erroneously failed to instruct the jury sua sponte on the elements of accessory after the fact, and the instruction lessened the prosecutor's burden of proof. None of her contentions have merit.

The trial court instructed the jury with CALCRIM No. 375 as follows: "The People presented evidence that the defendant committed another offense the offense of *accessory after the fact* that was not charged in this case. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offense, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not: [¶] The defendant acted with the intent to commit murder for financial gain in this case. [¶] The defendant had a motive to commit the offenses alleged in this case. [¶] The defendant knew that the perpetrators intended to commit murder when she allegedly acted in this case. [¶] The defendant had a plan or scheme to commit the offenses alleged in this case. [¶] In evaluating this evidence, consider the

similarity or lack of similarity between the uncharged offense and the charged offenses. [¶] Do not consider this evidence for any other purpose. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime. [¶] If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of *murder*. The People must still prove each element of every charge beyond a reasonable doubt." (Italics added.)

"[T]he question is whether there is a 'reasonable likelihood' that the jury understood the charge as the defendant asserts. [Citations.] 'In addressing this question, we consider the specific language under challenge and, if necessary, the charge in its entirety. [Citation.] Finally, we determine whether the instruction, so understood, states the applicable law correctly.' [Citation.]" (*People v. Kelly* (1992) 1 Cal.4th 495, 525-526, fn. omitted.)

Relying on the first sentence of the instruction, Henderson asserts CALCRIM No. 375 improperly "validates that the People in fact did present such evidence[,]" and "constitutes a heavy judicial thumb on the scale supporting the prosecution." The first sentence states, "The People presented evidence that the defendant committed another offense the offense of *accessory after the fact* that was not charged in this case." But the instruction goes on to say the jury "may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense" and if the prosecutor did not satisfy this burden, the jury "must disregard this evidence entirely." Read in its entirety, the instruction properly advised the jury how to evaluate the other acts evidence and did not relieve the jury of determining whether the prosecution met its burden. The first sentence was not a judicial stamp of approval establishing the evidence as true. We reject Henderson's claim there is a conflict in the instruction as the first sentence does nothing

more than identify the evidence the prosecutor introduced. (See *People v. Haslouer* (1978) 79 Cal.App.3d 818, 830-831.)

Next, she complains the trial court failed to instruct the jury on the elements of accessory after the fact. She points to no authority, and we found none, to support her contention a trial court has the duty to instruct the jury on the elements of an uncharged offense admitted pursuant to Evidence Code section 1101, subdivision (b). CALCRIM No. 375 states the trial court should "insert [a] description of the alleged offense . . . ." It says nothing about instructing the jury on the uncharged offense. Although an accessory after the fact does have a legal meaning, "accessory" and "after the fact" have ordinary meanings that the jury was surely able to understand. Additionally, the jury did not have to find Henderson was an accessory after the fact in the Jarvi murder to convict her of the charged offenses. Moreover, none of the cases Henderson relies on support her claim the trial court had a sua sponte duty to instruct the jury on the elements of the crime of being an accessory after the fact as it related to the jury's consideration of the Jarvi murder evidence. Although we conclude the trial court did not err in failing to instruct the jury on the elements of the offense of accessory after the fact, it would be good practice to do so.

Lastly, Henderson argues the trial court improperly instructed the jury because the preponderance standard set forth in CALCRIM No. 375 conflicts with the general circumstantial evidence instructions CALCRIM No. 224 to lessen the prosecutor's burden of proof. We disagree.

CALCRIM No. 375 not only limited the purposes for which the evidence could be considered but clearly provided the following explanation to the jury regarding burden of proof: "If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of *murder*. The People must still prove each *element of every charge* beyond a reasonable doubt." The jury would still

have to determine whether all the elements of the charges were proven beyond a reasonable doubt, as the instruction plainly stated, and therefore, Henderson's federal due process rights were not implicated.

The same argument Henderson advances has been rejected by the California Supreme Court with respect to different but similar instructions. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1016 [CALJIC No. 2.50.01]; *People v. Medina* (1995) 11 Cal.4th 694, 762-764 [CALJIC No. 2.50.1].) Although the instructions were different, the reasoning in those cases is persuasive here. (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1336.) Therefore, the trial court properly instructed the jury with CALCRIM No. 375.

B. Prosecutor's Closing Argument

Henderson raises numerous claims with respect to the prosecutor's closing argument. Before addressing those claims, we provide the relevant portions of that argument for context.

During closing argument, after discussing reasonable doubt, homicide, and aiding and abetting, the prosecutor recited what the evidence demonstrated Henderson knew prior to the Hawks's murders. The prosecutor then stated: "Now, all of these arguments, ladies and gentlemen, are trying to give her the benefit of every one of these things. Because she is involved. Intuitively, every one of you knows she is involved in the . . . Jarvi murder. We all know that she knows what's going on with Jarvi. She knows they are broke. They talk 17 times. [¶] The problem is before the Jarvi murder we just don't have any involvement with her. She never met him, or we got no evidence of it. She is not making plans to spend his money, or we have no evidence of that. [¶] So under our system of justice, for the Jarvi murder [Henderson] gets a walk because we can't prove her involvement ahead of time. After the fact she is involved in all the ways that we just talked about. But, ahead of time, there isn't anything. Now, the Hawkses [*sic*] is something completely different."

Upon returning from their noon recess, the prosecutor continued: "Over the lunch hour it was called to my attention I may have misspoken about one legal concept. So, let me segue for a minute and talk about the relationship between the . . . Jarvi murder and the murder of Thomas and Jackie . . . as far as it relates to [Henderson]. [¶] I just want to take a minute here and go through what the law says about actions. I am going to read this to you letter for letter. This is the way the court is going to address you at the end of the case so you understand how the law works on this. [¶] The People have presented evidence that the defendant committed an offense of being an accessory after the fact in this case to the murder of . . . Jarvi, which was not charged in this case. If you decide that the defendant committed the uncharged offenses, you must -- I am sorry -- you may but are not required to consider that evidence for the limited purpose of deciding whether or not the defendant acted with the specific intent required to prove her involvement in the charged murder, or whether she had a plan or scheme to commit the offenses alleged in this case. [¶] In evaluating this evidence, you may consider the similarity or lack of similarity between the uncharged and the charged offenses. Do not consider this evidence for any other purpose except for the limited purpose of establishing the defendant's intent during the charged crime. Do not conclude from this evidence the defendant has a bad character or is disposed to commit crime. [¶] If you conclude that the defendant committed the uncharged offense; namely, accessory after the fact, that conclusion is only one factor to consider along with all other evidence. It is not sufficient by itself to prove that she is guilty of murder. The People must still prove each element of the charge beyond a reasonable doubt. [¶] Okay. So as far as the . . . Jarvi murder case goes, obviously, you can't speculate as to what her involvement was in that ahead of time. The fact is you know everything that we know as far as her evidence in the actual murder of Jarvi. There is just nothing there. You can, however, consider her involvement after the fact and you can consider what she did after the murder of Jarvi. And the court and the law directs you to consider the similarities or lack of

similarities between the two events and her behavior. [¶] But, the point, you are allowed to consider her knowledge of her husband's actions. In other words, she didn't do anything bad as far as the murder of Jarvi and there is no evidence that she did. But, she knows about [Deleon's] actions as we have already gone through this morning. [¶] The point is: As you compare the two, number one, she knew everything that we have already covered about [Deleon's] involvement in that murder. And when you look at the two, she is not charged with the murder of . . . Jarvi because there is no evidence that she was involved in the murder of . . . Jarvi. There is nothing beforehand, like we talked about before. [¶] But, when you look at that and you compare that to the Hawks case, there is a tremendous amount of evidence of her involvement before. [¶] So I want to make sure that everybody is clear on that. You can't speculate. There is no evidence that she was involved. And I think I just wanted to clear that up briefly. I am going to move ahead on a couple points before we go back to our before, during and after analysis." When discussing the similarities between the Jarvi murder and the Hawks['s] murders, the prosecutor continued: "Now, in that we are not -- [Henderson] hasn't done anything wrong in any of that. [Henderson] has done nothing wrong so far. There is . . . no evidence of her involvement before and you can't speculate, and she is just not guilty of the Jarvi murder."

After completing his interpretation of the evidence, the prosecutor stated: "Now, in the future, ladies and gentlemen, I guarantee to you that -- you know, this case isn't the most famous case. There are plenty of other cases that have had way more media in Orange County. Even in the last year. [¶] But, people have heard about this, and at some point people are going to ask you, 'You sat as a juror on that case'-- every one of you is going to get this question. You say why would that man go out to sea with those guys. You are all going to get it. The answer is sitting right there." The prosecutor continued with his closing argument, discussing the events after the murder.

During an in-chambers conference, defense counsel, after waiving Henderson's presence, moved for a mistrial. For purposes of developing an adequate record, the trial court explained that after the prosecutor's closing argument where he discussed Henderson's role in the Jarvi murder, there was an in-chambers conference during lunch where defense counsel objected to the prosecutor's argument and stated he intended to request a mistrial, and the parties agreed they would address the issue later. Defense counsel argued the prosecutor suggested the jury use the Jarvi murder evidence for an impermissible use and acknowledged that after lunch, the prosecutor "did the best that anybody could have done to correct it." Counsel requested a mistrial or alternatively, a curative instruction.

The trial court characterized the prosecutor's argument concerning Henderson's involvement in planning the Jarvi murder as ambiguous but opined an inference could be made she assisted Deleon. The trial judge stated he suggested to the prosecutor that he clarify the permissible use of the Jarvi murder evidence as it related to Henderson, which the prosecutor did. The court opined the prosecutor's explanation cured any improper inference, and the prosecutor did not commit misconduct. The court denied the mistrial motion.

During rebuttal argument, the prosecutor responded to defense counsel's argument that, at most, the evidence established Henderson was an accessory after the fact. The prosecutor stated: "But, how many times do you get to claim ignorance for something like that? You know, in our day-to-day lives how many times have any of us been put in a situation where we are covering for a murder that somebody else committed? How many times are we in a situation where we are financially benefitting from that? [¶] You know, it is like the old expression 'fool me once, shame on you. Fool me twice, shame on me.' How many times do we as a society allow somebody to claim ignorance for something like that?"

At the conclusion of the prosecutor's rebuttal argument, there was an in-chambers conference. Defense counsel again waived Henderson's presence and renewed his mistrial motion. Counsel explained the prosecutor urged the jurors to use the Jarvi murder evidence for an impermissible use. Counsel stated the prosecutor cured his previous misuse of the Jarvi murder evidence, but during rebuttal, he again asked the jury to infer she participated in the Jarvi murder and she then participated in the Hawks's murders. After the trial court asked counsel to more specifically articulate his objection, counsel repeated the prosecutor cured his previous misuse of the Jarvi murder evidence but again suggested an improper use. The prosecutor explained the purpose of the Jarvi murder evidence was to demonstrate Henderson's knowledge of Deleon's involvement in Jarvi's murder prior to the Hawks's murders. The court denied the mistrial motion, explaining it interpreted the Jarvi murder evidence as "classic [Evidence Code section] 1101[, subdivision] (b), motive and intent, common scheme or plan and knowledge." The court concluded, "And . . . [the prosecutor] can correct the court if this is wrong, but I got it as relates more to the knowledge element than the others; although, the others, the inference was certainly there."

1. Prosecutorial misconduct

Henderson argues the prosecutor committed misconduct during closing argument by urging the jury to consider the community's reaction. The Attorney General asserts Henderson forfeited appellate review of this issue because defense counsel did not object on grounds of prosecutorial misconduct and request an admonition. Henderson responds an objection and request for admonition would have been futile because the prosecutor's argument appealed to the jury's fears and could not be cured. Alternatively, Henderson claims that if she did forfeit this claim, she received ineffective assistance of counsel. As we explain below, we conclude Henderson forfeited appellate review of this issue and she was not prejudiced by defense counsel's failure to object the prosecutor committed misconduct.

a. Waiver

"'A defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety.' [Citation.]" (*People v. Lopez* (2008) 42 Cal.4th 960, 966.)

Here, Henderson acknowledges defense counsel did not object to the complained of statements on the grounds they were prosecutorial misconduct. Additionally, any harm could have been cured if counsel had objected and requested an admonition. The trial court could have immediately instructed the jury to not be influenced by bias, sympathy, prejudice, or public opinion (*People v. Adanandus* (2007) 157 Cal.App.4th 496, 512), an instruction the court later did give to the jury. Therefore, this claim is waived. We will next address her ineffective assistance of counsel claim.

b. Ineffective assistance of counsel

"If defendant fails to show that he was prejudiced by counsel's performance, we may reject [her] ineffective assistance claim without determining whether counsel's performance was inadequate. [Citation.]" (*People v. Sanchez* (1995) 12 Cal.4th 1, 40-41, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Here, it is not reasonably probable that but for defense counsel's alleged unprofessional errors, the result of the proceeding would have been different.

There was overwhelming evidence supporting the jury's verdicts. In October 2004, the couple was living with Henderson's parents, in severe debt, and expecting their second child. The following month, they told a realtor and their accountants they were about to acquire a large sum of money and a yacht, and wanted to purchase an expensive home with a boat slip. On the first day Deleon intended to kill the Hawks, he sensed they were apprehensive, and after aborting his plan that day, he called Henderson and told her to go to Newport Beach and put the Hawks "at ease." Henderson

and Deleon took their child to the Well Deserved. The day before the murders, there was evidence that Henderson, who was in Cypress, and Deleon spoke on the telephone, and someone modified the power of attorney forms on their home computer. And, on the day of the murders, Henderson and Deleon spoke on the telephone 15 times. Additionally, after the murders, there was evidence Henderson suggested to a family member they killed the Hawks for their money and she played a significant role in trying to obtain ownership of the Well Deserved and trying to access the Hawks's bank accounts. Finally, there was evidence from the couple's family it was Henderson who controlled the family's financial matters and she "wore the pants" in the relationship. Therefore, Henderson suffered no prejudice from any alleged prosecutorial misconduct.

2. Mistrial motions

Henderson contends the trial court erroneously denied her mistrial motions when the prosecutor argued she was involved in the Jarvi murder and when he argued she could not "claim ignorance" of Deleon's crimes. Not so.

a. Denial

"'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citation.] 'A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial.' [Citation.]" (*People v. Williams* (2006) 40 Cal.4th 287, 323.)

With respect to the first motion, after an in-chambers conference, the prosecutor explained to the jury he had misspoken concerning the Jarvi murder evidence. After reading the jury instruction concerning the proper use of Evidence Code section 1101, subdivision (b), evidence, the prosecutor repeatedly said there was no evidence Henderson was involved in the Jarvi murder and she was not guilty of that

crime. He explained the evidence only supported the conclusion she was involved after the fact and explained the inferences that may drawn from that evidence.

The trial court did not abuse its discretion in denying the first mistrial motion. The court was in the best position to assess the exact nature of the prosecutor's statements and their likely effect on the jury concerning the uncharged offense evidence. Based on our review of the entire record, nothing undermines the court's conclusion the prosecutor's argument did not irreparably damage Henderson's chance of receiving a fair trial, and the prosecutor cured any harm he caused. Indeed, later, defense counsel stated, "I believe he cured it yesterday in his [closing] argument." Finally, as we explain above, the trial court instructed the jury on the proper use of this evidence, and again, we presume the jury followed the court's instruction.

As to the second motion, after defense counsel argued the evidence only established Henderson was an accessory after the fact to the Hawks's murders, the prosecutor alluded to the Jarvi murder evidence and argued that Henderson's contention was meritless. When read in its entirety, we interpret the prosecutor's argument to be Henderson could not claim ignorance of the Hawks's murders beforehand because she had knowledge Deleon was involved in the Jarvi murder. As we explain above, this was a permissible use of the Jarvi murder evidence—to demonstrate Henderson's intent and knowledge. The trial court did not abuse its discretion in denying Henderson's second mistrial motion.

b. Henderson's right to be present

Henderson claims her constitutional and statutory rights to be present at the mistrial motion hearings were violated. We disagree.

"Under the Sixth Amendment's confrontation clause, a criminal defendant does not have a right to be personally present at a particular proceeding unless his appearance is necessary to prevent 'interference with [his] opportunity for effective cross-examination.' [Citations.] [¶] Similarly, under the Fourteenth Amendment's due

process clause, a criminal defendant does not have a right to be personally present at a particular proceeding unless he finds himself at a 'stage . . . that is critical to [the] outcome' and 'his presence would contribute to the fairness of the procedure.' [Citation.] [¶] Under section 15 of article I of the California Constitution, a criminal defendant does not have a right to be personally present 'either in chambers or at bench discussions that occur outside of the jury's presence on questions of law or other matters as to which [his] presence does not bear a '"'"reasonably substantial relation to the fullness of his opportunity to defend against the charge."'"' [Citations.] [¶] Lastly, under sections 977 and 1043 . . . , a criminal defendant does not have a right to be personally present where he does not have such a right under section 15 of article I of the California Constitution. [Citations.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 741-742.)

Preliminarily, the trial court did not exclude Henderson from the hearings. Defense counsel waived her presence. And, her absence did not implicate her Sixth Amendment right to confront the witnesses against her because the bases of the motions were the prosecutor's closing argument. During both mistrial hearings, defense counsel contended the prosecutor argued an impermissible use for the Jarvi murder evidence. Henderson's presence at those hearings would not have contributed to the fairness of the proceedings because they involved a legal issue—the permissible uses of the Jarvi murder evidence. (*People v. Tapia* (1994) 25 Cal.App.4th 984, 1021 [admissibility other acts evidence solely question of law].) Henderson did not have a constitutional or statutory right to be present in chambers to participate in a hearing on this issue.

3. Cumulative error

Henderson claims the cumulative effect of the errors concerning admission of the Jarvi murder evidence prejudiced her. We have concluded there were no errors with respect to the admission of this evidence, and therefore, her claim has no merit.

II. CALCRIM No. 376, "Possession of Recently Stolen Property as Evidence of a Crime"

Henderson contends the trial court erroneously instructed the jury with CALCRIM No. 376. The Attorney General agrees it was error, but claims it was harmless. We agree Henderson was not prejudiced by the error.

The trial court instructed the jury with CALCRIM No. 376 as follows: "If you conclude that the defendant knew she possessed property and you conclude that the property had in fact been recently stolen, you may not convict the defendant of *murder* based on those facts alone. However, if you also find that supporting evidence tends to prove her guilt, then you may conclude that the evidence is sufficient to prove she committed *murder*. [¶] The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove her guilt of *murder*. [¶] Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt."

In *People v. Prieto* (2003) 30 Cal.4th 226, 248-249 (*Prieto*), the California Supreme Court concluded a trial court's application of CALJIC No. 2.15, "Possession of Stolen Property,"[17] to nontheft offenses like rape or murder was erroneous. The court explained that "'[p]roof a defendant was in conscious possession of recently stolen property simply does not lead naturally and logically to the conclusion the defendant committed' a rape or murder." (*Prieto, supra,* 30 Cal.4th at p. 249.) Therefore, here, the trial court erroneously instructed the jury with CALCRIM No. 376, although we presume the court likely did so because along with the theory of willful, deliberate, and premeditated murder, the prosecutor also proceeded on the alternative theory of felony murder, with the felony being burglary.

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[17] CALCRIM No. 376 is the equivalent of CALJIC No. 2.15.

The question then becomes whether Henderson was prejudiced by the error. Based on all the circumstances of this case, we conclude she was not. The trial court properly instructed the jury on the required elements of murder and the special circumstances. Additionally, the court instructed the jury that the prosecutor had the burden of proving each of the required elements beyond a reasonable doubt. Finally, the court instructed the jury on its responsibility to evaluate the totality of the evidence, including how to properly evaluate circumstantial evidence. Although the court erred in instructing the jury with CALCRIM No. 376, given all the instructions, we do not think it reasonably likely the jury misinterpreted the law in a manner unfavorable to Henderson. (*People v. Barker* (2001) 91 Cal.App.4th 1166, 1176-1177.) And as we explain above in greater detail, there was overwhelming evidence of Henderson's guilt. Thus, it is not reasonably probable she would have received a more favorable result had the trial court not instructed the jury with CALCRIM No. 376.[18]

III. Special Circumstances

A. Section 190.2, Subdivision (a)(1)-Murder for Financial Gain

Henderson asserts the trial court erroneously modified CALCRIM No. 720, "Special Circumstances: Financial Gain," and insufficient evidence supported the jury's finding. Neither contention has merit.

Section 190.2, subdivision (a)(1), provides: "The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special

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[18] Henderson suggests the appropriate standard of review is the one articulated in *Chapman v. California* (1967) 386 U.S. 18. In *Prieto, supra,* 30 Cal.4th at pages 248-249, the California Supreme Court concluded the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, applies. Based on *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, we must do the same. (*People v. Harden* (2003) 110 Cal.App.4th 848, 859.)

circumstances has been found under [s]ection 190.4 to be true: [¶] (1) The murder was intentional and carried out for financial gain."

1. CALCRIM No. 720

CALCRIM No. 720 provides: "The defendant is charged with the special circumstance of murder for financial gain. [¶] To prove that this special circumstance is true, the People must prove that: [¶] 1. The defendant intended to kill; [¶] 2. The killing was carried out for financial gain; [¶] and [¶] 3. *The defendant expected the financial gain to result from the death of* _____." (Italics added.)

Henderson claims the trial court erroneously omitted the above italicized portion. In *People v. Bigelow* (1984) 37 Cal.3d 731, 750 (*Bigelow*), the California Supreme Court explained there was an overlap between the financial gain special circumstance (§ 190.2, subd. (a)(1)) and the felony-murder special circumstance (§ 190.2, subd. (a)(17)) because "most robberies, as well as many burglaries, kidnappings and arsons, are committed for financial gain." The Supreme Court reasoned that courts should interpret special circumstance provisions to minimize cases in which multiple special circumstances will apply to the same conduct. (*Bigelow*, *supra*, 37 Cal.3d at p. 751.) As CALCRIM No. 720 bench notes confirm, the *Bigelow* decision was the impetus for the addition of the expectation element.

In *People v. Howard* (1988) 44 Cal.3d 375, 410, the California Supreme Court explained its "major concern in *Bigelow* was to prevent overlapping special circumstances findings based on the same conduct." The court added: "*Bigelow's* final articulation of the scope of the provision must be viewed in terms of the problem it sought to correct. . . . We conclude, therefore, that *Bigelow's* formulation should be applied when it is important to serve the purposes underlying that decision, but that it is not intended to restrict construction of 'for financial gain' when overlap is *not* a concern." Finally, in *People v. Crew* (2003) 31 Cal.4th 822, 850 (*Crew*), the California

Supreme Court stated *Bigelow's* limiting instruction "does not apply when there is no overlap among the special circumstances actually charged."

Here, the information did not charge Henderson with the section 190.2, subdivision (a)(17), felony-murder special circumstance, and therefore, the overlap the *Bigelow* court was concerned with is not present here. Indeed, CALCRIM No. 720's bench notes state, "The third element should not be given if the robbery-murder special circumstance is not charged." Although the information charged two special circumstances, murder for financial gain and multiple murders, there was no risk of overlap. In other words, there was no risk the jury would use the same conduct to find both special circumstances true. The conduct of intending to kill the Hawks to obtain their yacht and money was distinct from killing both Thomas and Jackie.

Henderson also claims CALCRIM No. 720 does not require the jury to find "an intent on the part of the co-conspirator or aider and abettor . . . ." No, the instruction requires the jury to find "[t]he *defendant* intended to kill[,]" and because Henderson was the only defendant in this case, we conclude the instruction properly informed the jury that to find the financial gain special circumstance true, it had to find *Henderson* intended to kill the Hawks for financial gain. (Italics added.)

2. Sufficiency of the evidence

Henderson also claims there was insufficient evidence Henderson expected a financial gain from the Hawks's murders. Again, we disagree.

In *Crew, supra,* 31 Cal.4th at pages 850-851, the court stated: "In the absence of overlap among the charged special circumstances, 'the relevant inquiry is whether the defendant committed the murder in the expectation that he would thereby obtain the desired financial gain.' [Citation.] It is not required that the murder be committed exclusively or even primarily for financial gain. [Citations.] Nor, contrary to defendant's argument, is there any requirement that the killing be the only means of obtaining the financial gain. The standard is whether the 'purpose' of the murder was to

obtain financial gain, 'whether or not achievable.' [Citation.] [¶] . . . [¶] In determining the validity of a challenge to a criminal conviction on the ground of insufficient evidence, this court reviews '"the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] The same standard applies to special circumstance allegations.' [Citation.]" Here, as we explain above, there was overwhelming evidence Henderson intended to aid and abet the Hawks's murders for financial gain.

B. Section 190.2, Subdivision (a)(3)-Multiple Murders

Henderson argues the trial court erroneously instructed the jury with CALCRIM No. 721, "Special Circumstances: Multiple Murder Convictions," because it did not require the jury to find an aider and abettor must intend to kill. We conclude Henderson was not prejudiced.

Section 190.2, subdivision (a)(3), provides: "The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under [s]ection 190.4 to be true: [¶] (3) The defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree."

The trial court instructed the jury with CALCRIM No. 721 as follows: "The defendant is charged with the special circumstance of having been convicted of more than one murder in this case. [¶] To prove that this special circumstance is true, the People must prove that: [¶] 1. The defendant has been convicted of at least one charge of first degree murder in this case; [¶] and [¶] 2. The defendant has also been convicted of at least one additional charge of either first or second degree murder in this case."

An intent to kill is required for the jury to find true the multiple murder special circumstance under the theory of accomplice liability. (*People v. Jones* (2003) 30 Cal.4th 1084, 1117; *People v. Williams* (1997) 16 Cal.4th 635, 688 (*Williams*).) CALCRIM No. 721 did not require the jury to find Henderson intended to kill the Hawks, and the trial court did not instruct the jury with CALCRIM No. 702, "Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Other Than Felony Murder," as CALCRIM No. 721's bench note suggests, presumably because the prosecutor proceeded under two theories or murder—willful, deliberate, and premeditated murder and felony murder. However, with regard to the financial gain special circumstance, the trial court instructed the jury with CALCRIM No. 720, which did require the jury to conclude beyond a reasonable doubt Henderson intended to kill the Hawks. As we explain above, CALCRIM No. 721 properly stated the law.

Therefore, we conclude beyond a reasonable doubt the jury would have found true the multiple murder special circumstance had it included language requiring the jury to find Henderson intended to kill the Hawks. It would not have found she intended to kill the Hawks for financial gain and then found she did not intend to commit multiple murders. (*Williams, supra,* 16 Cal.4th at p. 689 [when trial court fails to instruct jury on element of special circumstance allegation, error harmless when court able to conclude that in determining truth of special circumstance allegation jury had necessarily found intent to kill under other properly given jury instructions].)

IV. Section 1202.4-Restitution Fine

Henderson asserts the trial court erroneously imposed a $20,000 restitution fine pursuant to section 1202.4. The Attorney General concedes the error. We agree there was error and order the restitution fine reduced.

Section 1202.4, subdivision (b), states: "In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those

reasons on the record. [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars ($200), and not more than ten thousand dollars ($10,000), if the person is convicted of a felony . . . ."

"'[T]he maximum [restitution] fine that may be imposed in a criminal prosecution is $10,000 "regardless of the number of victims or counts involved." [Citation.]' [Citations.]" (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534; see *People v. Holmes* (2007) 153 Cal.App.4th 539, 547.) We modify the judgment so as to reduce the restitution fine imposed on Henderson to $10,000.

DISPOSITION

The abstract of judgment is modified to reflect a restitution fine of $10,000 pursuant to section 1202.4, subdivision (b). The clerk of the superior court is ordered to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation, Division of Adult Operations. We affirm the judgment as modified.

O'LEARY, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.